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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-690

KATHLEEN R. REITER,

Petitioner,

v.

SONOTONE CORPORATION, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF FOR PLAINTIFFS IN KENNDY SMITH v. TOYOTA MOTOR SALES U. S. A. AND FIVE RELATED CASES AND IN DONNA JEAN WEINBERGER v. FEDERATED DEPARTMENT STORES AND RELATED CASES AS AMICI CURIAE.

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE.

Plaintiffs in *Kennedy Smith v. Toyota Motor Sales U. S. A., Inc. and Five Related Cases*[1] and plaintiffs in *Donna Jean Weinberg v. Federated Department Stores and Related Cases*[2] hereby respectfully move for leave to file the attached brief as *amici curiae* in this case. The consent of attorney for petitioner has been obtained. The consent of attorneys for the respondent was requested and refused.

Movants' interest in this case arises from the fact that they are parties to cases which, like the case before the Court, involve the issue of whether consumers who purchased price-fixed goods for personal use and were overcharged may sue for injury to their "property" under Section 4 of the Clayton Act. The cases of movants have been argued before the Ninth Circuit Court of Appeals, and the Ninth Circuit has entered orders deferring decision of those appeals pending resolution of this case.

The cases brought by movants follow federal price fixing investigations, and federal price fixing suits. A decision in this case, where no such investigation, federal complaint or indictment is present, regarding the right of a consumer to sue would govern the cases of the movants and other cases which follow, and supplement, federal price fixing suits.[3] Movants believe that their brief will contain

1. United States Court of Appeals for the Ninth Circuit, Docket Nos. 77-1849, 77-1850, 77-1851, 77-1852, 77-1724, and 77-1725. The named plaintiffs are: Kennedy Smith, Barry S. Kohn, Jonathan Kilburn Carr, Richard P. Gardner, Charleen Pellar, Marla Bussard, Marc D. Goldberg, Robert J. Berman, Debra Berman and Alan Blau.

2. United States Court of Appeals for the Ninth Circuit, Docket Nos. 77-1547, 77-1548, 77-1549, 77-1550, and 77-1551. The named plaintiffs are: Donna Jean Weinberg, Eleanor Eisenberg, Sandra A. Musser, June Morgan, David M. Kimmel.

3. The *Reiter* case was brought subsequent to FTC complaints in the hearing aid industry alleging anticompetitive practices, other than price fixing. See CCH Trade Regulation Reporter

a more complete argument regarding the complementary role of government and consumer actions in the federal antitrust enforcement scheme than the briefs which will be filed by the parties.

Respectfully submitted,

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3. (Cont'd.)
¶ 20,326; ¶ 20,382; ¶ 20,605 (consent decrees). Unlike the cases brought by amici, it does not follow a Justice Department or FTC action alleging price fixing.

INTEREST OF AMICI CURIAE.

Each *amicus* is a non-business consumer. Each has brought a treble damage action under 15 U. S. C. § 15 against firms which were the subjects of preceding price-fixing suits by the Federal government. The defendants in these actions moved to dismiss on the grounds that the plaintiffs lacked standing because as retail non-business consumers, they had not been injured in their "business or property." The motions were granted in *Weinberg v. Federated Department Stores*, 426 F. Supp. 880 (N. D. Cal. 1977) and *Kennedy Smith v. Toyota Motor Sales*, 1977-1 CCH Trade Cases ¶ 61,251 (N. D. Cal. 1977). Appeals from those dismissals were argued before the Ninth Circuit and orders have been entered staying disposition of the appeals pending decision in this case.

This Court's construction of the phrase "business or property" in Section 4 of the Clayton Act will govern the decision in the cases brought by *amici*.

SUMMARY OF ARGUMENT.

For seventy years, courts have followed Justice Holmes' construction of the "business or property" requirement in *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 390, 396 (1906): "A person whose property is diminished by payment of money wrongfully induced is injured in his business or property." Consumers are injured in this manner by overcharges from price-fixing as surely as businesses. Indeed, the rationale of this Court's rejection of *parens patriae* actions in *Hawaii v. Standard Oil Co. of California*, 405 U. S. 251 (1972), was the risk that defendants would be liable for duplicative damages, to individuals and to the "general economy" of the state. *Id.* at 264.

The Eighth Circuit's reversal of settled law by inserting a requirement of injury to *business* consumers is unjustified by legislative history or antitrust policy.

The antitrust bill originally introduced by Senator Sherman provided a cause of action to "any person . . . injured or damnified" by an antitrust violation; it was to "give a private remedy to every person injured." Remarks of Senator Sherman, 21 Cong. Rec. 2563 (1890). As rewritten by the Senate Judiciary Committee, and ultimately adopted, the act allowed damages to "any person injured in his business or property". This alteration, however, was not intended to exclude consumers. Senator Edmunds, Chairman of the Committee, "repeated that this section was intended by the Committee on the Judiciary to allow anybody who wishes, to sue." 21 Cong. Rec. 3149 (1890). While both before and after the Judiciary Committee's revisions, several senators questioned whether, in view of the costs and procedural difficulties of federal litigation, individuals would have *practical* access to the damage remedies granted by the bill, all believed that consumers were accorded the *legal* option of seeking treble

damages. The cause of action granted by § 7 of the Sherman Act was reenacted virtually verbatim in § 4 of the Clayton Act, and the relevant legislative history shows that the reenactment was intended to be of identical scope.

The same concerns that prompted the Court to grant standing to foreign governments in *Pfizer, Inc. v. Government of India*, 434 U. S. 308 (1978) dictate all the more that it honor Congress' intent to grant all consumers a cause of action. To adopt the Eighth Circuit's "business purchaser" rule would arbitrarily deprive most individuals of a right to compensation for illegal overcharges, and at the same time allow antitrust violators to escape full responsibility for their actions. The availability of civil and criminal actions by the government would not heal this gaping breach. Recent empirical work indicates that most of the deterrent effect of Government antitrust prosecutions can be traced to the private actions brought in their wake.

Price fixing cases currently present three principal issues: whether the defendants illegally conspired to fix prices, whether the plaintiff was overcharged, and the amount of this overcharge. The requirement of sorting "business" from "non-business" purchases would add a fourth issue to becloud litigation, particularly in cases of mixed use by a single purchaser. This needless complication of antitrust law further counsels against adoption of a novel and unjustified doctrine. See, *Illinois Brick Co. v. Illinois*, 431 U. S. 720, 732, 737 (1977).

As this Court observed in *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U. S. 477, 486 n. 10 (1977) the legislative history of the treble damage remedy indicates "that it was conceived of primarily for as a remedy for 'the people of the United States as individuals', especially consumers." The Court should not frustrate that Congressionally intended remedy by upholding a construction of "business or property", more narrow than the ordinary meaning of "property".

ARGUMENT.

I. For Over Seventy Years, Courts Have Interpreted Overcharges to Consumers of Price-Fixed Goods to Be Injuries in "Business or Property".

Examination of the holding of the Eighth Circuit must begin by placing that decision in perspective. The determination that only business entities may bring suit to recover price fixing overcharges strips non-business consumers of a cause of action which courts have recognized for over seventy years.

The first authoritative exposition of the meaning of the terms "business or property" was set forth by Justice Holmes in *Chattanooga Foundry & Pipe Works v. City of Atlanta,* 203 U. S. 390 (1906). In that case, the City of Atlanta, which bought pipe for its waterworks, brought suit against pipe manufacturers who had engaged in price fixing to recover three times the difference between the price it paid for the pipe and the price which would have prevailed absent the conspiracy. The verdict in the city's favor was appealed to this Court. In their brief, the defendants argued, *inter alia,* that the City of Atlanta, as a consumer of pipe, had no standing to bring suit under the Sherman Act, whose purpose was to protect competition. While competitive businesses might have a cause of action against antitrust violators, it was argued:

> "[T]o extend the operation of the Act so as to give a right of action under the Seventh Section thereof, to every consumer seeking to recover back as excessive a part of the price paid for goods . . . . would include a class of actions not contemplated by Congress, and not necessary to insure competition in interstate trade." Appellants' Brief in *Chattanooga Foundry & Pipe Works v. City of Atlanta, supra,* pp. 8-11.

Justice Holmes gave short shrift to the argument, declaring:

> "The city was a person within the meaning of § 7 . . . . *It was injured in its property,* at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. *A person whose property is diminished by payment of money wrongfully induced is injured in his property.*" 203 U. S. at 396.[4] (Emphasis added).

Although the City of Atlanta bought its price-fixed pipe for use in waterworks whose services were sold to citizens, Justice Holmes disavowed reliance on that fact. As Professor Sullivan notes, the case's "rationale clearly covers the property of an ultimate consumer as well as that of a business firm." L. Sullivan, *Antitrust* 771 n. 3 (1977).

Any ambiguity on this point was set to rest by the holding forty years later in *Georgia v. Evans,* 316 U. S. 159 (1942). There, the State of Georgia was permitted to bring an action in its own name charging injury from a price fixing conspiracy in the market for asphalt which the state purchased annually for use in the construction of public roads. The case contains no intimation that the asphalt was used in entrepreneurial activities. *Cf., Pfizer, Inc. v. Government of India,* 434 U. S. 308 (1978) (Indian, Iranian, and Philippine governments had standing to sue for overcharges in purchase of antibiotics). Similarly, in

4. In *Thomsen v. Cayser,* 243 U. S. 66, 88 (1917) the Court extended this holding to overcharges for services, stating "The plaintiffs alleged a charge over a reasonable rate and the amount of it. If the charge be true that more than a reasonable rate was secured by the combination, the excess over what was reasonable was an element of injury."

Goldfarb v. Virginia State Bar, 421 U. S. 773 (1975), this Court upheld a finding of liability in a class action for damages brought by a retail home purchaser against a state bar association.[5]

In *Hawaii v. Standard Oil Co. of California*, 405 U. S. 251 (1972), this Court held that Hawaii could not sustain a *parens patriae* suit for injuries to its general economy from a price fixing conspiracy in oil, since such damage did not constitute injury in business or property as contemplated by the statute. Taken alone, the Court's reasoning that "business or property" refers to "commercial interests or enterprises", *id.* at 264, might appear to undermine the argument for consumer standing; but in context the holding buttresses the case for standing. The Court held that the state may vindicate "commercial interests" by bringing suit "in its proprietary capacity" *id.* 262, "where the injury to the state occurs in its capacity as a consumer in the marketplace". *Id.* at n. 14. Consumption "in the marketplace" is a "commercial interest" for purposes of the business or property test, and it is an activity that may be undertaken by private consumers as well as states.[6]

5. Dicta in a number of recent cases also indicate that this Court views consumers as possessing a cause of action under the antitrust law. See, *Pfizer Inc. v. Government of India*, 434 U. S. 308, 313-314 (1978) ("Clearly, therefore, Congress did not intend to make the treble damage remedy available only to consumers in our own country"); *id.* at 324, 325 (Burger, C. J., dissenting) (citing "the focus . . . on protecting *domestic* consumers", Sherman Act is "primarily a remedy for American consumers"); *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U. S. 477, 486 n. 10 (1977) (Sherman Act is a remedy "for the people of the United States as individuals, especially consumers"); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U. S. 481, 491 (1968) (reaffirming "the general principle that the victim of an overcharge is damaged within the meaning of Section 4 to the extent of that overcharge").

6. See, *Goldfarb v. Virginia State Bar Assn., supra*, 421 U. S. at 786-88 ("examination of a land title is a service; the exchange of such a service for [a consumer's] money is commerce in the most common usage of that word").

Indeed, it was "the problem of double recovery inherent in allowing for damages both to the *economic interests of individuals* and the quasi-sovereign interest of the state" *id.* at 264 (emphasis supplied) that provided the impetus for the Court's disapproval of *parens patriae* actions. The Court stated that under appropriate circumstances, a state could "bring a class action on behalf of some *or all* of its consumer citizens." *Id.* at 266. (Emphasis supplied). The Court reiterated the holding of *Chattanooga Foundry* that the Sherman Act permits recovery for "payment of money wrongfully induced": "damages are established by the amount of the overcharge". *Id.* at 262 n. 14.

Development in the lower courts followed a similar course. Before 1977, the few cases that found it necessary to consider explicitly the "business or property" language interpreted it under *Chattanooga* to allow suit by any individual overcharged by a price fixing conspiracy. *E.g.*, *Cleary v. Chalk*, 488 F. 2d 1315, 1319 n. 17 (D. C. Cir. 1973), *cert. denied* 416 U. S. 938 (1974). See, *Bravman v. Bassett Furniture*, 552 F. 2d 90, 98-99 and n. 23 (3d Cir.) *cert. denied* 434 U. S. 823 (1977) ("The right of consumers to challenge price fixing conspiracies is well established").[7] With the emergence of class actions under Rule 23, F. R. Civ. P., courts evidenced tacit approval of consumer standing through the widespread certification of consumer classes.[8]

7. Cases which invoked the "commercial interest" test did so to bar claims for remote injuries unrelated to monetary overcharges suffered by consumers as a result of their purchases. *E.g.*, *In re Multidistrict Vehicle Pollution*, 481 F. 2d 122 (9th Cir. 1973) (injury from environmental pollution); *Ragar v. T. J. Raney & Sons*, 388 F. Supp. 1184, 1187 (E. D. Ark.) *aff'd*, 521 F. 2d 795 (8th Cir. 1975) *per curiam* (taxpayer suit for increase to bond interest rates paid by municipality).

8. See, *e.g.*, *In Re Independent Gasoline Antitrust Cases*, 1978-1 CCH Trade Cases ¶ 62,085 (D. Md. 1978); *Axelrod v. Saks*

The term "business or property" does not define who may sue. It instead defines, as one commentator has pointed out, the "content of the requisite injuries. Whereas injury to such noneconomic values as aesthetics, conservation and recreation has been held sufficient to support standing in a nonantitrust context, the Supreme Court has squarely held that Section 4 is concerned exclusively with 'commercial injury'" Sherman, *Antitrust Standing: From Loeb to Malamud*, 51 N. Y. U. L. Rev. 371, 397 (1976)

8. (Cont'd.)
& Co., 1978-1 CCH Trade Cases ¶ 61,819 (E. D. Pa. 1978); *Kromer v. Saks & Co.*, 1977-2 CCH Trade Cases ¶ 61,771 (S. D. N. Y. 1978); *Chevalier v. Baird Savings Assoc.*, 72 F. R. D. 140 (E. D. Pa. 1976); *In Re Arizona Bakery Products Litigation*, 1976-2 CCH Trade Cases ¶ 61,120 (D. Ariz. 1976); *In Re Arizona Dairy Products Litigation*, 1975-2 CCH Trade Cases ¶ 60,395 (D. Ariz. 1975); *Dennis v. Saks & Co.*, 1975-2 CCH Trade Cases ¶ 60,396 (S. D. N. Y. 1975); *Knowles v. Tuscaloosa Real Estate Board*, 1975-2 CCH Trade Cases ¶ 60,501 (N. D. Ala. 1975); *Lafrak v. Arabian American Oil Co.*, 405 F. Supp. 597 (E. D. N. Y. 1975); *Link v. Mercedes-Benz*, 1975-2 CCH Trade Cases ¶ 60,534 (E. D. Pa. 1975), *app. dism'd.*, 550 F. 2d 860 (3d Cir. 1977) (*en banc*) *cert. den.*, 431 U. S. 933 (1977); *Hemley v. American Honda Motor Co.*, 1975-2 CCH Trade Cases ¶ 60,457 (S. D. N. Y. 1975); *Hill v. A-T-O, Inc.*, 1975-1 CCH Trade Cases ¶ 60,235 (E. D. N. Y. 1975); *Sommers v. Abraham Lincoln Savings & Loan Assn.*, 66 F. R. D. 581 (E. D. Pa. 1975); *Weit v. Continental Illinois Nat'l Bank*, 60 F. R. D. 5 (N. D. Ill. 1973), *app. dism'd.*, 535 F. 2d 1010 (7th Cir. 1976); *Foster v. Maryland State Savings & Loan Assoc.*, 1974-2 CCH Trade Cases ¶ 75,317 (D. D. C. 1974); *Hill v. Art Rice Realty Co.*, 1974-2 CCH Trade Cases ¶ 75,364 (N. D. Ala. 1974); *P. D. Q. Inc. of Miami v. Nissan Motor Corp.*, 61 F. R. D. 372 (S. D. Fla. 1973); *Forbes v. Greater Minneapolis Area Real Estate Board*, 61 F. R. D. 416 (D. Minn. 1973); *In Re Ampicillin Antitrust Litigation*, 55 F. R. D. 269 (D. D. C. 1972); *Marks v. San Francisco Real Estate Board*, 1972 CCH Trade Cases ¶ 74,130 and ¶ 74,242 (N. D. Cal. 1972), *class decertified on other grounds*, 69 F. R. D. 353 (N. D. Cal. 1975), *appeal dism'd. and rem.*, 1977-1 CCH Trade Cases ¶ 61,275 (9th Cir. 1977); *State of West Virginia v. Chas. Pfizer Co.*, 440 F. 2d 1079 (2d Cir. 1971), *affg.* 314 F. Supp. 710 (S. D. N. Y. 1970); *Cusick v. N. V. Nederlandsche, etc.*, 317 F. Supp. 1022 (E. D. Pa 1970); *In Re Coordinated Pretrial Proceedings in Antibiotics Antitrust Actions*, 333 F. Supp. 278, 285 (S. D. N. Y. 1971); *Contract Buyers League v. F & F Investment*, 48 F. R. D. 7 (N. D. Ill. 1969).

(Footnotes omitted). Consumers, like businesses, may suffer "economic" or "commercial" injury from their transactions in the marketplace. As Professor Sullivan noted in 1977, while the phrase "business or property" "has not been the subject of artful elaboration, [b]y and large, any injury to financial interests, including those to a consumer which must pay more for a purchase because of a violation, have been held to be compensable." L. Sullivan, *supra* at 771.

Against this background, the case before the Court, and the trilogy of cases from the Northern District of California awaiting decision before the Ninth Circuit,[9] are radical departures from a settled understanding of the antitrust laws.[10] These departures have been rejected by a phalanx of recent, well-reasoned authorities, both state and federal: *Theophil v. Sheller-Globe Corp.*, 446 F. Supp. 131, 135 (E. D. N. Y. 1978); *DeGregorio v. Segal*, 443 F. Supp. 1257, 1260-61 (E. D. Pa. 1978); *In re Petroleum Products Antitrust Marketing Litigation*, 1977-2 CCH Trade Cases ¶ 61,639 (C. D. Cal. 1977); *In re Ampicillin Antitrust Litigation;* 1977-1 CCH Trade Cases ¶ 61,434 (D. D. C. 1977); *Lohse v. Dairy Commission of Nevada*, 1977-2 CCH Trade Cases ¶ 61,805 (D. Nev. 1977); *New Jersey Chiropractic Society v. Radiological Society of New Jersey*, 1978-1 CCH Trade Cases ¶ 61,894 (N. J. Super. 1978); *Rosack v. Volvo of America Corp.*, 1977-1 CCH Trade

9. *Weinberg v. Federated Department Stores*, 426 F. Supp. 880 (N. D. Cal. 1977); *Kennedy Smith v. Toyota Motor Sales*, 1977-1 CCH Trade Cases ¶ 61,251 (N. D. Cal. 1977); *Gutierrez v. E & J Gallo Winery Co.*, 425 F. Supp. 1221 (N. D. Cal. 1977).

10. See, American Bar Association, *Antitrust Law Developments* (1975) at 261-2, "To recover damages a 'person injured' by an antitrust violation must assert injury inflicted upon 'business or property.' *Chattanooga Foundry & Pipe Works v. City of Atlanta* [203 U. S. 390 (1906)] established that '[a] person whose property is diminished by a payment of money wrongfully induced is injured in his property.'"

Cases ¶ 61,395 (Calif. Super. 1977). The Eighth Circuit's "business purchaser" test [11] is contrary to decisions of this Court discussed above, and is without justification in statutory language, legislative history, or considerations of policy.

II. The Language and History of the Antitrust Laws Bespeak an Intent to Allow Suits by Consumers Overcharged by Price Fixers.

As this Court recently observed, "The starting point in every case involving the construction of a statute is the language of the statute itself". *International Brotherhood of Teamsters v. Daniel*, — U. S. —, 47 USLW 4135, 4136 (1979). The language at issue here is that of Section 4 of the Clayton Act, derived directly from Section 7 of the Sherman Act. It provides treble damages to:

> "any person who shall be injured in his business or property by reason of anything forbidden by the antitrust laws of the United States."

Each of the elements of this provision extends to the consumers who seek to bring suit here.

A. Consumers Are "Persons".

Private individuals fall naturally within the ambit of the term "person". This Court reiterated the breadth of this language just last term:

> "'The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.' *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 236, 68 S. Ct. 996, 1006, 92 L. Ed. 1328; cf. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U. S. 134, 138-139, 88 S. Ct. 1981, 1984, 20 L. Ed. 2d 982. And the legislative history of the Sherman Act demonstrates that Congress used the phrase 'any person' intending it to have its naturally broad and inclusive meaning."

Pfizer, Inc. v. Govt. of India, 343 U. S. 308, 312 (1978). See, *United States v. Cooper Corp.*, 312 U. S. 600, 606 (1941) (the term "persons" includes "natural and artificial persons, that is, individuals and corporations.").

B. Consumers Overcharged by Price Fixers Are Injured "By Reason Of" Antitrust Violations.

Agreements or combinations to fix prices are *per se* illegal and the purpose of such agreements ordinarily is to increase the price charged to buyers. When a consumer buys a product directly from a price fixer at an increased price, that consumer is injured by reason of the violation and suffers "injury of the type the antitrust laws were intended to prevent . . . the type of loss that the claimed violations would be likely to cause." *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U. S. 477, 489 (1977).

C. Consumers Overcharged by Price Fixers Are Injured in Their "Business or Property".

As set forth above, since the *Chattanooga Foundry* case, courts have adopted the position that "A person whose property is diminished by a payment of money wrongfully induced is injured in his property . . . . The damage complained of must almost or quite always be damage in property, that is, in the money of the plaintiff." 203 U. S. 390, 396-7. The language of the statute gives no intimation that only businesses may be so injured; the

11. In addition to the decision under review, which was denied *en banc* rehearing by a vote of four to three, the Eighth Circuit followed the *Reiter* holding in *Beckers v. International Snowmobile Indust. Assn.* 1978-2 CCH Trade Cases ¶ 62,191 (8th Cir. 1978).

statute speaks in the alternative of "business *or* property". See, *e.g., Hecht v. Pro-Football, Inc.*, 570 F. 2d 982, 993, n. 47 (D. C. Cir. 1977) (to recover under § 4 plaintiffs must prove "injury *either* to their business *or* to their property") (emphasis in original). As Professor Forkosch observes:

> "If the individual who was granted treble damages was meant to be solely the producing competitor, why does Section 7 [of the Sherman Act] speak of injury to one's business or property? 'Business,' it is true, refers to the entrepreneur and disregards the consumer *per se*. But property is not limited to the entrepreneur—it embraces . . . any loss of money through illegal overcharges, or price increases." M. Forkosch, *Antitrust and the Consumer (Enforcement)* (1956) 148.

Contrary to the apparent meaning of the statutory language, the Eighth Circuit majority in *Reiter* concluded that the legislative history of the Sherman and Clayton Acts compels the exclusion of consumers from treble damage actions. The Court of Appeals' conclusion flies in the face of the legislative history of the treble damage remedy, which indicates "that it was conceived of primarily as a remedy for 'the people of the United States as individuals' especially consumers." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra,* 426 U. S. at 486 n. 10, *quoted with approval, Pfizer, Inc. v. Govt. of India, supra,* 434 U. S. at 325 (Burger, J. dissenting).

1. The Legislative History of the Sherman Act Supports Consumer Standing.

The current provision for treble damages was first codified in § 7 of the Sherman Antitrust Act of 1890.

Reiter v. Sonotone Corp., 579 F. 2d 1077, 1079 (8th Cir. 1978). Debate on that provision centered not on whether the bill gave consumers the legal right to bring suit—that was assumed—but rather whether the inducement provided to these "private attorneys-general" would be adequate as a practical matter to enable the victims of monopolization to recover their damages.

a. Senator Sherman's Initial Bill Provided for Consumer Actions.

The bill drafted by Senator Sherman allowed recovery of "twice of the amount of damages sustained and costs of suit" together with a "reasonable attorney's fee" by "any person . . . injured or damnified" by an illegal combination or trust.[12]

The object of the section, according to Senator Sherman was "to give to private parties a remedy for personal injury caused by" an illegal combination. 21 Cong. Rec. 2456 (1890). In response to Senator Hoar's queries as to whether the bill's purpose was "to give private citizens who are injured by these combinations or monopolies for the

12. Following inaction on his original bill by the Fifteenth Congress, Sherman reintroduced it as S. 1 on December 4, 1889. Between this date and the Senate debate, the Bill was twice referred for redrafting to the Senate Committee on Finance, of which Sherman was the most influential member. The Senate debate lasted from March 21, 1890 through March 27, 1890. See M. Forkosch, *supra* at pp. 45-124.

As of March 18, 1890, the precursor to Section 7 read as follows:

> "Sec. 2. That any person or corporation injured or damnified by such arrangement, contract, agreement, trust, or combination defined in the first section of this act may sue for and recover, in any court of the United States of competent jurisdiction, without respect to the amount involved, of any person or corporation a party to a combination described in the first section of this act, twice the amount of damages sustained and the costs of the suit, together with a reasonable attorney's fee." 21 Cong. Rec. 2600 (1890).

advancement of costs . . . a civil remedy in the courts", Senator Sherman affirmed: "Certainly . . . . The second section gives a private remedy to every person injured." 21 Cong. Rec. 2563 (1890).

A number of Senators, however, were skeptical of the consumers' practical ability to exercise their legally granted cause of action, in view of the expense and inconvenience of resort to the federal courts.

For example, Senator George complained early in the debates that:

> "*The right of action against the persons in the combination is given to the party damnified.* Who is this party injured, when, as proscribed in the bill, there has been an advance in the price of the combination? . . . . *The consumer is the party 'damnified or injured'* . . . .
>
> "Who are the consumers? The people of the United States as individuals; whatever each individual consumes, or his family, marks the amount of his interest in the price advanced by the combination. It is manifest that in nearly every instance the damage by the advanced price of each article affected by these combinations would be—though in the aggregate large, indeed—so small as not to justify the expense and trouble of a suit in a distant court." 21 Cong. Rec. 1767-68 (1890).

More sardonically, Senator Hiscock commented on the double damage provision:

> "Now then, let us look at the only remedy that the bill affords to an oppressed people . . . . A person sues the corporation or the combination or party to the combination. The combination is in twine, we will say, but the man who is injured is in Minnesota, and he is invited by this bill to travel to New York, . . . and commence his action in the circuit court of the United States and recover twice the damages that he has sustained . . . . [T]he people who are to suffer the damages are those who are distributed all over this broad land, the consumers of the article, the consumers of the merchandise, buying perhaps a hundred dollars' worth and damaged possibly $10 and they have the right to follow this combination or a party to wherever he is domiciled and recover twice the amount of damages they have sustained!
>
> Seriously Mr. President, it is a fearful attack upon trusts!" 21 Cong. Rec. 2571 (1890).

A similar refrain recurred in the speeches of other Senators,[13] but implicit in all of these adverse comments was the belief that the bill granted consumers a substantive right to damages, albeit perhaps without adequate procedural weapons to vindicate that right. Senator Sherman did not entirely disagree with the critics. He felt it important, however that, "a man injured by an unlawful

13. See, Remarks of Sen. Teller, *id.* at 2571 ("Who suffers by [a decrease in competition of oil]? The sixty-five millions of people in the United States who use oil . . . . How much damage have they sustained? It is inconsequential individually, but great to the whole mass of people . . . [T]hese great corporations do not care how frequently they are brought into court where the damages that the parties get are just simply twice what the individual who makes the complaint has sustained"); Remarks of Sen. Reagan, *id.* at 2564 ("[T]he great mass of the people who are the sufferers from these combinations and trusts will not have the means to employ counsel and to take witnesses to the Federal Courts, often at a great distance from them to vindicate and enforce their rights"); Remarks of Sen. Coke at *id.* 2516 ("If the party damnified, as has been said heretofore in this debate were a great corporation, a wealthy association, it could employ lawyers . . . but how could these consumers of the articles produced by these trusts, the great mass of our people—the individuals go about showing the damages they had suffered"?).

combination, [should] . . . have the power to sue in the courts of the United States . . . . Very few actions will probably be brought, but the cases that will be brought will be by men of spirit, who will contest against these combinations." 21 Cong. Rec. 2569 (1890).

b. The Bill as Revised by the Senate Judiciary Committee Provided for Consumer Actions.

After major debate on the bill, Senator Sherman's draft was referred to the Senate Judiciary Committee.[14] The bill reported back to the Senate on April 2, 1890, became the present version of the Sherman Act. The revised bill was hospitable to private rights of action. In the civil damages section, re-numbered § 7, plaintiffs were to be awarded treble damages, rather than the double damages called for by Sen. Sherman's original proposal.

Where Senator Sherman's proposal had provided for suit by "any person injured or damnified," the Judiciary Committee's draft gave a right of action to "any person injured in his business or property." It is this latter change that the majority of the Eighth Circuit interpreted as a rejection of Senator Sherman's original intent to provide "a private remedy to every person injured," including consumers.

The debates on the revised bill reveal that no such radical alteration was contemplated. In opening debate on the Judiciary Committee's version of the bill, Senator Hoar, an influential member of the Committee stated: "I shall not undertake to explain the bill, which is well understood," 21 Cong. Rec. 3145 (1890). Examination of the legislative history led former Solicitor General Bork to

14. The committee was composed of Senators Edmunds, George, Hoar, Ingalls and Evarts. See, M. Forkosch, *supra*, pp. 158-66.

take this comment to mean that the Judiciary Committee had not basically changed the thrust of Senator Sherman's original enactment. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. Law & Econ. 7, 44-45 (1966). See, *id.* at 14-15.

More particularly, the remarks of Senator Edmunds, one of the principal draftsmen of the final bill,[15] and also Chairman of the Judiciary Committee, belie the assertion that the change from "person injured or damnified" to "person injured in his business or property" was a calculated limitation of the private right of action, or a rejection of consumer standing.

Section 7, he stated

> "provides that *any person who shall be injured, etc.* by anything declared unlawful in this act may sue therefor in the circuit court of the United States . . . without regard to the amount in controversy. That is all. The whole object of the seventh section is to relieve the circuit court of the United States from the question of *quantum* in dispute . . . . [T]his section merely gives in the circuit court of the United States *the right of anybody to sue who chooses to sue,* without regard to the amount in controversy." 21 Cong. Rec. 3148 (1890). (Emphasis supplied).

A carefully drawn exclusion of consumers would hardly be characterized as "any person who shall be injured, etc." by one of its principal draftsman. Nor would one of the authors of such a provision "repeat that this section was intended by the Committee on the Judiciary *to allow anybody who wished, to sue* in a court of the United States without regard to the $2,000 limitation." *Id.* at 3149. (Emphasis supplied).

15. See, *Pfizer Inc. v. Govt. of India, supra* 434 U. S. at 313; *Apex Hosiery v. Leader*, 310 U. S. 469, 489 n. 10 (1940).

In his "exhaustive analysis of the Sherman Act's legislative history" [16] Professor Forkosch noted: "If we accept the view that the final Sherman Act is designed to aid entrepreneurs only and that no consumer's interests are guarded in the act, except ultimately through its support of free competition, then a complete about face would have occurred between the time at which Sherman introduced his first bill and that at which he voted for the Act which bore his name . . . . The opinion of this writer . . . is that no such reversal did occur." M. Forkosch, *supra* pp. 97-98.

Even the criticisms of the Judiciary Committee's bill attest to its continuity with Senator Sherman's original proposal. Senator George, who had previously questioned the practical utility of the damage remedy to "consumers" (see, p. 16, *supra*) advanced an unsuccessful amendment to provide procedural mechanisms (some adopted many years later in Rule 23 of the Federal Rules of Civil Procedure) which would have allowed victims of monopolies to assert jointly the rights granted to them by the Act. 21 Cong. Rec. 3148 (1890).

In the absence of such mechanisms, he questioned, "How can a single man thus injured . . . from $10 to $50, with his witnesses, go to a distant town or city, employ a lawyer and sue one of these great trusts in a United States Court? —" *Id.* 3148.

Senator George went on to predict that without a means of aggregating claims:

> "[N]ot one suit will ever be brought under this seventh section by any person who is simply damaged in his character as a consumer . . . .
>
> If some great manufacturer has been injured by an advance in the price of his raw material, he can sue, but the poor man, the consumer, the laborer, the farmer, the mechanic, the country merchant all that large class of American citizens who constitute 90 per cent of our population and who are the real sufferers will have no opportunity for redress, and the bill so far as they are concerned will be a snare and a mere delusion. 21 Cong. Rec. 3150 (1890).

16. *Reiter v. Sonotone Corp.*, 579 F. 2d 1077, 1079 n. 4 (8th Cir. 1978).

Senator George, who was also a member of the Judiciary Committee, believed that the procedural ability to aggregate the substantive claims would provide a viable means for enforcing rights already granted under the Act.[17] Similarly, Senator Reagan argued that his proposed amendment to allow suits in state court under Section 7 would remedy the bill's failure to provide a more practical procedure to assert rights granted to "men of ordinary means." 21 Cong. Rec. 3146, 3147, 3149 (1890). In contrast, not a single senator made a comment which can be construed as rejecting the existence of a consumer cause of action for price fixing under the Sherman Act.

The Court of Appeals looked to the comments of Senator Morgan as support for a limitation of the scope of private actions. The context of these remarks robs them of authority for such a proposition. Senator Morgan, in opposition to Senator Reagan's proposal to allow treble damage actions in state court, declared:

> *"The Senator from Texas [Mr. Reagan] has been for many years trying to reform the transportation of this country, trying to reform its interstate commerce, and he is very eager and very anxious to give every remedy that ingenuity could possibly suggest, but I suggest to the Senator there is no occasion for going so far as*

17. Curiously, the 8th Circuit majority seemed to cite Senator George's comments as evidence that consumers were excluded from Section 7. 579 F. 2d at 1080.

> *to bring up a great constitutional difficulty over which war will be had.* This bill ought not to be a breeder of law suits. If there is any one duty we have got higher than on the respect of the general judiciary of the United States, it is to suppress litigation and have justice done without litigation so far as we can." 21 Cong. Rec. 3149 (1890) (emphasis supplied)

The Court of Appeals neglected to quote the italicized portion in its reproduction of Senator Morgan's comments—which indicate not hostility to private suits, but distaste for constitutional ambiguity. Nor does its opinion reveal Senator Reagan's response, which is entitled to equal consideration: "If the senator will allow me I will suggest that the very object of this is to make litigation or there would be no use for it." *Id.*

In any event, neither the comments of Senator Morgan nor of Senator Reagan, who were not members of the Judiciary Committee which drafted the legislation, carry weight when compared to the statements of Senators Edmunds, Hoar and George, who served on the Committee.

Thus, as Professor Forkosch's study concluded:

> "[I]nvestigation on this point has led to the result that this relegation of the consumer to the position of a merely indirect beneficiary of the Sherman Act is not justified. The great wealth of evidence for the consumer interest which the bills and the debates have yielded make that theory not alone suspect, but clearly erroneous." M. Forkosch, *supra,* p. 143.

2. Section 4 of the Clayton Act Was Merely a Reenactment of Section 7.

Section 4 of the Clayton Act is in all pertinent respects a verbatim reenactment of Section 7 of the Sherman Act.

As stated in the *Report of the Senate Committee on the Judiciary,* S. Rep. No. 698, 63d Cong. 2d Sess., 45 (1914): "This section, which gives *any person injured* by a violation of the antitrust acts the right to sue in the Federal courts for threefold the damages by him sustained, including the costs and reasonable attorney's fees is not proposed to be amended in any particular." (Emphasis added.) Comments to this effect are scattered throughout the legislative history—in the initial House and Senate debates,[18] in the Hearings [19] and Reports [20] of these two bodies, and in the final House and Senate debates on the ultimately-enacted conference version.[21]

Although the 63rd Congress, like its predecessor the 51st, did not deem it necessary to define by statute the phrase "business or property," definitions of those words, which emerged during the course of the debate over the labor exemption, reaffirm the obvious meaning of the language employed. In order to make the point that "there is a *fundamental difference* between property and business," 51 Cong. Rec. 9559 (1914) (emphasis supplied), Representative Casey entered the following dictionary definitions into the Record:

> "Definition of property: Property means the domination of indefinite right of user and disposition which one lawfully exercises over particular things

18. Remarks of Representatives Floyd, 51 *Cong. Rec.* 1964 (1914) and Green, 51 *Cong. Rec.* 9595 (1914); remarks of Senator Shields, 51 *Cong. Rec.* 14,214 (1914).

19. Hearings before the Subcommittee of the Committee on the Judiciary, U. S. Senate, submitted during the 60th, 61st, and 62nd Congresses and compiled for use in consideration of H. R. 15, 657. *See,* House Report No. 627, page 36.

20. Senate Report No. 698, "Unlawful Restraints and Monopolies," submitted to the Senate on July 22, 1914, by Senator Culberson.

21. Remark of Representative Floyd, 51 *Cong. Rec.* 16,319 (1914); remarks of Senator Nelson, 51 *Cong. Rec.* 15,938 (1914).

or subjects and generally to the exclusion of all others. Property is ownership, the exclusive right of any person freely to use, enjoy, and dispose of any determinate object, whether real or personal." (English, and American Encyclopedia of Law.) 51 *Cong. Rec.* 9559 (1914).

"Definition of business: That which occupies the time, attention, and labor of men for the purpose of livelihood or profit; that which occupies the time, attention, and labor of man for the purpose of profit and improvement." (English and American Encyclopedia of Law.) 51 *Cong. Rec.* 9559 (1914).

In light of this distinction, the inclusion of both business and property in the disjunctive statutory language "injured in his business *or* property" takes on added significance. Both consumers and businesses have standing to sue for injury to that which they have the exclusive right to "use, enjoy, and dispose of," while businesses may sue for injury to "that which occupies . . . men for the purpose of livelihood or profit".[22]

Remarks throughout the Congressional Record which refer to standing in terms of business interests are easily located. But this proves only the self-evident—that injured businesses have standing also. All that can be gleaned from the legislative history of § 4 is an intention to extend the unconstricted remedy of predecessor § 7 of the Sherman Act to other violations outlawed by the Clayton Act.

22. The trilogy of *Weinberg, supra, Smith, supra* and *Gutierrez, supra,* erred in ignoring this portion of the relevant legislative history to conclude that "the phrase *business or property* cannot be read to encompass injuries to pure business interests and also to pure property interest, in the disjunctive. The phrase is a conjunctive reference to interests of a business nature." 426 F. Supp. at 884.

3. The Antitrust Improvements Act of 1976 Supports Consumer Standing.

The text of the *parens patriae* provision, 15 U. S. C. § 15C, § 4C of the Clayton Act, provides in pertinent part:

"Sec. 4C(a)(1) Any attorney general of a State may bring a civil action in the name of such State, as parens patriae *on behalf of natural persons* residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section *for injury sustained by such natural persons to their property* by reason of any violation of the Sherman Act. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims pursuant to subsection (b)(2) of this section, and (ii) any business entity. (Emphasis supplied).

The treble damages provided in *parens patriae* actions are thus intended to benefit only "natural persons" injured in their "property", without duplicating any amounts awarded them for the same injury, and excluding "business entities". In view of the commitment of the 94th Congress to providing effective remedies for the non-business consumer,[23] Congress would not have selected the second half of the disjunctive phrase "business or *property*" as the criterion for injury if it understood the previous enactments

23. See, *e.g.*, H. R. Rep. No. 94-499, 94th Cong., 2d Sess. 4-12 reprinted in [1976] U. S. Code Cong. & Admin. News pp. 2572, 2573-80. (Noting that "the economic burden of many antitrust violations is borne in large measure by the consumer", at the retail level, but deploring the lack of "effective redress to injury inflicted on consumers", and stating that the purpose of the 1976 Act was to "solve" this problem.)

protecting "property" to exclude purchases by non-business consumers.

The legislators did not contemplate the creation of additional substantive liability in the 1976 Act; they did not propose to alter the definition of injury to business or property within the meaning of Section 4. Their intention was simply to create a new procedural device with which to enforce existing rights of recovery:

> "[The amendment] creates no new substantive liability. *Each person on whose behalf the State attorney general is empowered to sue already has his own cause of action under Section 4 of the Clayton Act,* even if, for practical reasons, the right to sue is not likely to be exercised. Subsection 4C(a) thus provides an *alternative* means to make *practically* available Federal remedies at law, previously denied, for the vindication of existing substantive claims. H. R. Rep. No. 94-499, 94th Cong., 1st Sess., 9 (1975) (Emphasis supplied)

If "property" in § 4 of the Clayton Act is now defined to exclude non-business purchases, "property" in § 4C of the 1976 Act will be similarly defined,[24] in effect rendering the *parens patriae* remedy a nullity.

Thus the very purposes and structure of the 1976 Act indicate Congress' conclusion that consumers may sue under the earlier Antitrust acts.[25] The Eighth Circuit's

24. See, *Illinois Brick Co. v. Illinois,* 431 U. S. 720, 733-34 n. 14 (1977).

25. Indeed, the consumer may exclude himself from the *parens* action and pursue his individual lawsuit. 15 U. S. C. § 15C(b)(2) and (3).

Both House and Senate Committee Reports disavowed any intent to restrain private treble damage litigation in providing a *parens patriae* alternative. *See,* H. R. Rept. No. 94-499, 94th Cong., 1st Sess. 19 (1975); S. Rept. No. 94-803, 94th Cong., 2d Sess. 38 (1976).

business purchase test disregards Congress' interpretation of § 4, and frustrates the *parens patriae* remedy. *Cf. Red Lion Broadcasting Co. v. F. C. C.,* 295 U. S. 367, 380-81 (1969).

III. A Limitation of Treble Damage Actions to "Business" Consumers Would Undermine Both the Deterrent and Remedial Purposes of the Antitrust Laws, and Cause Needless Confusion.

A. A Limitation to Business Consumers Would Frustrate the Purposes of the Antitrust Laws.

Last term, this court dealt with the question of whether foreign governments may maintain a treble damage action under the federal antitrust laws. *Pfizer Inc. v. Government of India,* 434 U. S. 308 (1978). The concerns articulated in that case run precisely parallel to the policies at issue here. The Court in *Pfizer* emphasized that:

> "§ 4 has two purposes: to deter violators and deprive them of 'the fruits of their illegality,' and 'to compensate victims of antitrust violations for their injuries.' *Illinois Brick Co. v. Illinois,* 431 U. S. 720, 746, 97 S. Ct. 2061, 2075, 52 L. Ed. 2d 707; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U. S. 477, 485-486, 97 S. Ct. 690, 695-96, 50 L. Ed. 2d 701; *Perma Life Mufflers, Inc. v. International Parts Corp.,* 392 U. S. 134, 139, 88 S. Ct. 1981, 1984, 20 L. Ed. 2d 982. To deny a foreign plaintiff injured by an antitrust violation the right to sue would defeat these purposes. It would permit a price fixer or a monopolist to escape full liability for his illegal actions and would deny compensation to certain of his victims, merely because he happens to deal with foreign customers." 434 U. S. at 314-15.

Similarly, if the Eighth Circuit's "business purchaser" test becomes the law, price fixers of retail items like cars or gasoline would escape liability for that large portion of the damages caused by sales to non-business customers. A retail price fixing conspiracy in goods used only for personal consumption such as hearing aids would be entirely immune from damage actions.[26] On the other side of the equation, the "business purchaser" rule presents the prospect of arbitrarily denying compensation to a consumer who suffered an overcharge, when a "business purchaser" of the same goods from the same price-fixer receives three times his damages. Such results are neither equitable nor wise. If policies of deterrence and compensation warrant extending the damage remedy to foreign governments, whom Congress did not consider in its debates, *a fortiori* they mandate recognizing the domestic consumer's right of action, which the drafters of the Sherman Act explicitly contemplated.

In *Pfizer*, the court placed particular emphasis on deterrence:

> "Moreover, an exclusion of all foreign plaintiffs would lessen the deterrent effect of treble damages . . . . If on the other hand, potential antitrust violators must take account of the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators. *Id.* at 315.

To the extent that portions of a potential price fixer's sales attributable to "non-business" purchasers are carved out of

26. As set forth above, since the definitions of the *parens patriae* statute of 1976 track the language of § 4, and Congress explicitly disclaimed intention of creating new liability, states would be no better able to bring suit than the consumers themselves.

the base on which treble damages may be calculated, the option of price-fixing becomes more attractive to firms subject to that temptation.

The Eighth Circuit's opinion suggests that Federal prosecutions and government civil actions may substitute for treble damage recoveries as a deterrent. 579 F. 2d at 1086 n. 16. Such an argument ignores the fact that the current scheme of antitrust deterrence relies on private damage action to follow and complement government suits. See, *e.g., Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U. S. 311, 320 (1965) ("We must necessarily rely on the one element of congressional intention which is plain . . . the clearly expressed desire that private parties be permitted the benefits of prior government actions."); *United States v. Borden Co.*, 347 U. S. 514, 518 (1954) ("private and public actions were intended to be cumulative.").

Congress has expressly indicated its intention to encourage this pattern of enforcement. See, *e.g.*, 15 U. S. C. § 16(a) (litigated government judgments are admitted as *prima facie* evidence in related private cases); 15 U. S. C. § 16(i) (pendency of government action tolls the statute of limitations for potential private actions); and 15 U. S. C. § 30 (depositions in government actions must be taken in public). The policy favoring the private suit arising from government investigation was reiterated by Congress in enacting the Antitrust Procedures and Penalties Act of 1974, which requires the United States in settling its own antitrust actions to consider and file an impact statement on "the remedies available to potential private plaintiffs damaged by the alleged violation" and the effect of settlement on related private actions. 15 U. S. C. § 16(b)(4). The same Act expressly authorizes the courts to consider impact upon related private litigation in deciding whether to approve consent decrees. 15 U. S. C. § 16(e)(2).

Recent empirical work has emphasized the importance of private actions, for it has shown that a large measure of the deterrent effect of government prosecutions arises out of the threat of subsequent private recoveries. In a 1978 study, a team of economists from the Center for Econometric Studies of the Justice System of Stanford University's Hoover Institution observes:

> "Rather than imprisonment, the recovery of treble damages by bread consumers or distributors appears to be the potentially significant cost of being prosecuted for price fixing."
>
> Block, Nold and Sidak, *The Deterrent Effect of Antitrust Enforcement; A Theoretical and Empirical Analysis;* Hoover Institution Technical Report ISDDE-1-78 (December 1978 draft) pp. 26-27.

After an econometric analysis of the pattern of prices in the bread industry, the report concludes:

> "Only when class actions represent a credible threat does the Department of Justice produce a significant deterrent effect by prosecuting a horizontal price-fixing conspiracy. . . . Judging from evidence in the bread industry, the deterrent effect of a criminal prosecution for price-fixing appears almost entirely dependent on the existence of a substantial civil remedy." *Id.* at pp. 33-34, 35-36.

By barring consumer actions, the Eighth Circuit's holding would eliminate this deterrent, and drastically weaken antitrust enforcement at the retail level.

The Court of Appeals in this case exhibited reluctance to credit the deterrent impact of consumer actions. This reluctance was apparently based on its perception that "defendants who are unwilling or unable to defend such suits are compelled for economic reasons to settle actions

otherwise meritless." 579 F. 2d at 1086. Leaving aside the propriety of allowing such judicial predilections to abrogate a congressionally-granted cause of action, the concern of the Court of Appeals is still premised on a misconception.

It is true that the prospect of liability and damages tends to induce settlement in class actions as in individual actions. But there is no reason to suppose that such pressures are necessarily unfair, or greater in consumer class actions than in suits among competing large corporations. If defendants have violated the antitrust laws, injuring thousands, or hundreds of thousands of consumers, it is appropriate that a suit to recoup the loss should create some pressure towards settlement. Where suits are truly meritless, the pressure is relieved by the prospect of summary judgment or vindication at trial, and there is no indication that class actions are pressed to judgment less often than individual suits by injured competitors.[27]

An empirical study of class actions by the Commerce Committee of the United States Senate in 1974, Committee on Commerce, United States Senate, *Class Action Study,* 93rd Cong. 2d Sess. (1974) observed, *inter alia*:

> "Critics have charged that a defendant faced with a class action is forced to settle even if plaintiff's claim is weak. However, defendants in those cases which have been completed evidently preferred initially to press for dismissal or summary judgment and did not feel pressed to settle. In fact, 44 of the 81 completed cases, or 55 *percent, have been disposed of in favor of the defendant on preliminary motions.* Summary judgment was granted in 11 cases, while 33 others

27. Several major price fixing class actions have proceeded to trial during recent years, including cases involving the alleged national price fixing of Datsun automobiles, master key systems, and plywood.

were dismissed. The most frequent reason for dismissal was failure to state a claim.

Dismissals

Failure to state a claim	16
Lack of jurisdiction	4
Voluntary dismissal by plaintiff	4
Improper party, lack of standing, mootness, res judicata	5
Want of prosecution	2
Other	2
Total	33

Because no statistics are compiled on types of disposition of civil cases in any federal court, it is impossible to determine whether this high proportion of cases with early disposition by motion in favor of defendant is unique to class actions. Furthermore, the underlying reasons for early dismissal are difficult to ascertain. Defendants might contend that the high rate of dismissal indicates that a high number of frivolous suits are brought, while plaintiffs might assert that the high dismissal rate reflects a judicial hostility to the class action device. In fact, however, interviews with defendants' attorneys disclosed that no more than a handful would label their opponents' cases as frivolous.

"If frivolous cases are brought, the high proportion of dismissals and summary judgments indicates that the class action is not a very effective tool for forcing settlements. Moreover, defendant attorneys interviewed indicated that if faced with a weak suit they certainly would fight it on the merits initially before

agreeing to settle." (Emphasis added). *Id.*, Committee Print, pp. 9-10, cited with approval *Blackie v. Barrack*, 524 F. 2d 891, 899 n. 15 (9th Cir. 1975).

Equally important, the remedy proposed by the Eighth Circuit majority does not speak to the alleged evil. Business entities remain free to engage in the supposed meritless "blackmail" of class actions under the "business purchaser" rule. Consumers, on the other hand are barred from suit even when their actions follow government price fixing investigations and complaints, as do the suits brought by *amici* in this case.

B. The "Business Purchaser" Test Creates Needless Confusion in Antitrust Litigation.

The typical price fixing case currently presents three principal issues: did the defendants illegally conspire to fix prices; was the plaintiff overcharged as a result of the conspiracy; and if so, what was the amount of the overcharge (i.e., damage). The business purchaser rule adopted by the Eighth Circuit would add a fourth major line of inquiry as to every single purchase in a price fixing case: the use for which the purchased item was intended and the use to which it was put. Such an approach would "add whole new dimensions of complexity to treble damage suits and seriously undermine their effectiveness," *Illinois Brick Co. v. Illinois, supra* 431 U. S. at 737.

A single purchaser may engage in a substantial number of transactions. Many of these transactions may be for mixed use. The defendants' approach would require an intricate inquiry into the intended mixed use and actual mixed use of each purchase.

Suppose for example that citizen "A" purchased an automobile intending to use it in business, but did not in fact use it in business, while citizen "B" purchased an auto-

mobile intending personal use, but in fact used it in business. Is intended or actual use to govern? Is commuting to and from work a "business" or "non-business" use, or does this in turn depend upon the character of the business and the role of the driver (or the motor vehicle owner) in the business? How are mixed uses to be treated; how should a court characterize the purchase of an automobile intended for use or actually used for a variety of "business" and "non-business" purposes by one or more drivers? The permutations are virtually endless.

Difficulty of application may not always require rejection of a legal principle. But this Court has expressed its reluctance to adopt doctrines that would "greatly complicate and reduce the effectiveness of already protracted legal proceedings." *Illinois Brick Co. v. Illinois, supra. See Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U. S. 481, 493 (1968). The almost metaphysical intricacies latent in the "business purchaser" test counsel against introduction of an entirely novel and unwarranted distinction between business and non-business purchasers to plague courts and litigants.

CONCLUSION.

The judgment of the Court of Appeals should therefore be reversed and the case remanded.

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